

GIDEON KRACOV

Attorney at Law

801 South Grand Avenue
11th Floor
Los Angeles, California 90017

(213) 629-2071
Fax: (213) 623-7755

gk@gideonlaw.net
www.gideonlaw.net

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VIA ONLINE SUBMISSION:

reema.mahamood@sanjoseca.gov

Reema Mahamood, Environmental Project Manager
Department of Planning, Building and Code Enforcement
City of San Jose
200 E. Santa Clara St., 3rd Floor
San Jose, CA 95113

Re: Museum Place Mixed-Use Project (File No. H16-024 and T16-024) – Draft Supplemental Environmental Impact Report (SCH No. 2016112058) – Comments of UNITE HERE Local 19

Dear Ms. Mahamood:

On behalf of UNITE HERE Local 19 ("Local 19" or "Commentor"), this Office respectfully provides comments to the City of San Jose ("City" or "Agency") regarding the February 2017 Draft Supplemental Environmental Impact Report (State Clearinghouse No. 2016112058) ("SEIR") for the Insight Realty Company ("Developer" or "Applicant") Museum Place Mixed Use Project (File No. H16-024 and T16-024) ("Museum Place" or "Project").

This Project is discretionary, not by right. The Applicant seeks discretionary approvals under the San Jose Municipal Code ("SJMC" or "City Code"), including site plan review, approval of a Disposition and Development Agreement ("DDA"), and other plan approvals. As such, the City and its decisionmakers must make express findings that the Project, which has no affordable housing component identified in the Draft SEIR, be in the best interest of the general public. The City has the power to ensure the Project actually benefits the City and persons who live and work here like Local 19's members. Please use it.

Commentor writes to inform you that the Draft SEIR prepared for the Project – that relies heavily on past, more general program EIRs to dispense with more detailed Project-specific review – fails to comply with the California Environmental Quality Act ("CEQA"), Pub. Res. Code § 21000 et seq., and the State CEQA Guidelines, Cal. Code Regs. § 15000 et seq. ("CEQA Guidelines"). Commentor herein raises specific concerns about the Project SEIR with respect to land use inconsistency, reliance on outdated Program EIRs, improper Project description and piecemealing, failure to analyze a reasonable range of alternatives,

deferred mitigation of historic resources and loss of protected trees, faulty overriding considerations and the need for SEIR recirculation.

This comment letter is made to exhaust remedies under Pub. Res. Code § 21177 concerning the Project, and incorporates by this reference all written and oral comments submitted on the Project by any commenting party or agency. It is well-established that any party, as Commentor here, who participates in the administrative process can assert all factual and legal issues raised by any commenting party or agency. See *Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 875.

I. Brief Project Description

The Project involves the demolition of an existing 30,000 square foot ("SF"), single-story event facility (i.e. Parkside Hall) and the construction of approximately 1.16 million SF, 24-story mixed use project including: 239,729 SF of office related space; 306 dwelling units ("DU") within 431,235 residential development; 184 guest rooms occupying 166,535 SF of hotel/amenity area; 60,475 SF expansion of the adjacent Tech Museum of Innovation ("Tech Museum") requiring the conversion of the first below-grade parking level; and 19,002 SF of combined retail space (including the 5,600 SF added retail connected to the Tech Museum expansion). As proposed, the collective uses contained in this 270-foot tall structure will be serviced by a valet-only, three subterranean level parking garage containing 1,000 parking stalls provided primarily through two-space mechanical lifts.

The SEIR tiers off two program-level EIRs that have been repeatedly augmented over the years. In 2005, the City adopted/certified the Downtown Strategy 2000 Plan and EIR ("Strategy 2000") which was intended to guide future Downtown office, retail, residential, and hotel development through 2020. Originally, total development was to occur in four equal phases to coincide with transportation infrastructure improvements funded by the Redevelopment Agency. In 2011, the City adopted/certified the Envision San José 2040 General Plan and EIR ("Envision 2040"), which incorporated these development capacities. Since then, Strategy 2000 has been addended in 2014 and 2016 to adjust phase one development capacity ("Phase 1 Capacity"), while Envision 2040 was updated with a new Greenhouse Gas ("GHG") Reduction Strategy in 2015. Based on these EIRs and compliance with the City's General Plan, the SEIR for this Project concludes that the Project would cause no new or more significant impacts involving aesthetics, agricultural/forestry resources, air quality, biological resources, cultural resources, geology and soils, hazards and hazardous materials, hydrology and water quality, mineral resources, population and housing, public services, recreation, noise, transportation, and utilities. See SEIR, p. 4. The only listed significant unavoidable impact identified in the Project SEIR is shadows cast by the proposed building on Plaza de Cesar Chavez. *Id.* at v and 30.

II. Standing of Local 19

Local 19 is the hospitality workers' union in the South Bay. It advocates for hospitality projects and other development projects that are good for workers in the industry. Commentor represents over 4,500 members, a majority of whom live and work in San Jose, including members who work near the Project at the Fairmont, Four Points, Hilton, Hyatt Place, Marriott, Westin Hotels, and at the San Jose Convention Center. They will be directly affected by the Project's traffic, air quality, greenhouse gas ("*GHG*"), land use, cultural and biological, working conditions and other Project impacts.

Local 19 therefore is a stakeholder in this Project, and worker and labor organizations like Local 19 have a long history of engaging in the CEQA process to secure safe working conditions, reduce environmental impacts, and maximize community benefits. The courts have held that "unions have standing to litigate environmental claims." *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.

III. General Legal Background on CEQA and Program EIRs

1. Purpose of CEQA

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential, significant environmental effects of a project. See CEQA Guidelines § 15002(a)(1). "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354.

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring implementation of "environmentally superior" alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns." Pub. Res. Code § 21081; CEQA Guidelines § 15092(b)(2)(A) and (B). Mitigation measures should be capable of "avoiding the impact altogether," "minimizing impacts," "rectifying the impact," or "reducing the impact." CEQA Guidelines § 15370. Importantly, mitigation measures must be "fully enforceable through permit conditions, agreements, or other measures" so "that feasible mitigation measures will actually be implemented as a

condition of development.” *Federation of Hillside & Canyon Ass’n v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261.

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position.’ A ‘clearly inadequate or unsupported study is entitled to no judicial deference.’” *Berkeley Jets*, 91 Cal.App.4th 1344, 1355 quoting, *Laurel Heights Improvement Ass’n v. Regents of University of California*, 47 Cal.3d 376, 391 409, fn. 12 (1988). Substantial evidence in the record must support any foundational assumptions used for the impacts analyzed in the EIR. *Citizens of Goleta Valley*, 52 Cal.3d at 568 (EIR must contain facts and analysis, not just bare conclusions); *Laurel Heights*, 47 Cal. 3d at 392-93 (agency’s conclusions must be supported by substantial evidence).

Indeed, the fundamental goals of environmental review under CEQA are information, participation, mitigation, and accountability. *Lincoln Place Tenants Ass’n v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 443-444.

2. *Reliance on Programmatic Environmental Documents for Future Specific Projects Can be Limited*

As mentioned above, the Draft SEIR for this Project relies on the Strategy 2000 and Envision 2040 Program EIRs. A Program EIR is to be used for “general criteria to govern the conduct of an ongoing program.” CEQA Guidelines § 15168(a)(3). “A program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as specifically and comprehensively as possible. With a good and detailed analysis . . . no further environmental documents would be required.” *Id.* at subsection (c)(5). In determining whether additional, project-specific CEQA review is required, the agency must determine whether the “effects were fully analyzed in the program EIR.” *Id.* at discussion. If changes in the later project or new information show any new significant environmental effects or increase the severity of environmental effects identified in the program EIR, the agency must prepare an additional CEQA analysis. Pub. Res. Code § 21166; CEQA Guidelines § 15162.

“An EIR is required for a site specific project within the larger program if the project may cause significant effects.” *American Canyon Community v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1073. Thus, numerous courts require adequate supplemental CEQA review where a prior EIR fails to analyze significant changes in a future project or where there are previously unanalyzed or increased significant impacts. *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Ass’n* (1986) 42 Cal.3d 929, 934 (public entity violated CEQA when it failed to prepare a Supplemental EIR for significant project changes and new information); *American Canyon*, 145 Cal.App.4th at 1073 (increase in size and project changes is substantial change triggering subsequent environmental review).

IV. Specific Comments Regarding Draft SEIR Deficiencies

1. Land Use Inconsistency/Lack of Affordable Housing

A CEQA compliant EIR must discuss any inconsistency between the proposed Project and an applicable General Plan. CEQA Guidelines § 15125(d). This land use inconsistency is particularly acute here when it comes to affordable housing, a topic that the Project SEIR entirely ignores.

The SEIR does not mention the issue of affordability or whether any of the Project's 306 residential dwelling units will include affordable housing. It can only be assumed they are all market rate, which is a great concern to Local 19. According to the National Low Income Housing Coalition ("*NLIHC*"), the San Jose Metro Area is now the third most expensive metro area in the nation for renters.¹ According to ABAG's Regional Housing Need Allocation Report, San Jose alone needs a total of 20,849 units for households earning between very low to moderate incomes and 14,231 units for those earning just above moderate incomes and below by the year 2022.²

The City's General Plan reflects this urgent need for affordable housing, including Goal H-1 ("[p]rovide housing throughout our City ... to address the needs of an economically, demographically, and culturally diverse population"); Goal H-2 ("[p]reserve and improve San José's existing affordable housing stock and increase its supply such that 15% or more of the new housing stock developed is affordable to low, very low and extremely low-income households"); Policy H-1.2 ("respond to the needs of all economic and demographic segments of the community"); Policy H-1.9 ("[f]acilitate the development of housing to meet San José's fair share of the County's and region's housing needs"); Policy H-1.10 ("[f]acilitate housing that is affordable to those employed in population-serving, business support and driving industries"); Policy H-2.1 ("[f]acilitate the production of extremely low-, very low-, low-, and moderate income housing by maximizing use of appropriate policies and financial resources at the federal, state, and local levels; and various other programs"); Policy H-2.2 ("[i]ntegrate affordable housing in identified growth locations"); and Policy H-2.8 ("[f]acilitate the production of affordable and safe housing for workers who provide goods and services to San Jose residents and businesses"). With no affordability component, this Project likely is inconsistent with the General Plan and the City may be paying mere lip service to its Plan goals and policies.

Likewise, no mention is given to the Project's compliance with the City's Inclusionary Housing Ordinance ("*IHO*") or Affordable Housing Impact Fee ("*AHIF*"). Generally, IHO laws and guidelines³ require new residential developments to include 15

¹ See NLIHC (2016) Out of Reach: No Refuge for Low Income Renters, p. 10 (2016 most expensive jurisdictions), available at http://nlihc.org/sites/default/files/oor/OOR_2016.pdf.

² See p. 3, available at <http://www.abag.ca.gov/planning/housingneeds/pdfs/Final%20RHNA%20%282014-2022%29.pdf>.

³ Available at <https://www.sanjoseca.gov/DocumentCenter/View/57913>.

percent affordable units or pay in-lieu fees. See SJMC §§ 5.08.400, .500 and .520; see also IHO Guidelines 8.1 – 8.8. Projects within a redevelopment project area, like Museum Place,⁴ are not exempt and subject to various monitoring requirements. See SJMC §§ 5.08.320(G)(1) and 5.08.710. The IHO is already operative. See SJMC §§ 5.08.320 (C) and (D); see also IHO Guidelines 7.4 and 7.5. Under the AHIF resolution⁵ and adopted guidelines,⁶ impact fees are levied on all rental developments at the current rate of \$17.41 per SF. See Resolution No. 77218, § 5(A); see also AHIF Guideline 5.02.01. Some exemptions are provided for certain Downtown high-rises or DDA-subject projects. See AHIF Guidelines 2.04.01 and 2.06.01. However, the requirements under IHO and AHIF are intended to be “implemented in conjunction” with and “complementary” to each other. See IHO Guidelines 3.0; see also AHIF Guidelines, Part 3. Therefore, any exemption afforded under the AHIF is limited to only impact fees – not the inclusionary housing units. Again, with only market-rate units, this Project is likely inconsistent with the City Code and other affordable housing rules and regulations.

More feasibly can be done. While the City may be behind on its affordable housing goals, this Project does nothing to address the issue, and the SEIR is completely silent on General Plan or Code inconsistency related thereto. The SEIR should be recirculated to meaningfully address the affordable housing issue. Alternatively, any DDA with the City must ensure that the Project is available to low and moderate-income residents such as Local 19 members so they can have access to the Project’s residential component. The City has not demonstrated with substantial evidence why it is not feasible to include affordable housing in this Project consistent with the General Plan and Code.

2. The Project SEIR Improperly Relies on Outdated Program EIRs

The abbreviated Project SEIR relies almost entirely on the Strategy 2000 and Envision 2040 Program EIRs. As discussed in the Project’s Initial Study (“*IS*”), the SEIR concludes that beyond land use and shade impacts, all other impacts are less than significant or consistent with impacts previously disclosed in these programmatic EIRs. See SEIR, p. 4. However, the applicability of the Strategy 2000 and Envision 2040 environmental analysis is limited to only Phase 1 Capacity, which Downtown development was fast approaching (residential capacities) as of August 2016. See Revised Notice of Preparation of EIR for the Downtown Strategy 2040, p. 4.⁷ Since the dissolution of redevelopment agencies in 2012, the City has failed to complete the required Phase 1 traffic mitigation and therefore future projects “cannot proceed under the current Strategy 2000 EIR (with Addenda) and future projects would need to prepare individual EIRs or other CEQA documents to receive approvals” *Id.*

⁴ See City of San Jose Redevelopment Agency (Dec. 2009) Five-Year Implementation Plan, p. 21 (Park Center Plaza Map), available at <https://www.sanjoseca.gov/DocumentCenter/View/40497>.

⁵ Available at <http://www.sanjoseca.gov/DocumentCenter/View/37779>.

⁶ Available at <https://www.sanjoseca.gov/DocumentCenter/View/58179>.

⁷ Available at <http://www.sanjoseca.gov/DocumentCenter/View/66970>.

The SEIR downplays this fact by stating that Phase 1 Capacity levels “had not been met” as of November 2016 (SEIR, p. 1), but it neglects to place the Project within the context of the remaining development under Phase 1 Capacity and/or the required traffic improvement that are not yet implemented. This Project may exceed development capacities or exacerbate impacts previously studied. Therefore, it is questionable whether compliance with the General Plan alone is sufficient. For example, the Project’s IS concludes that the Project will cause no new GHG impacts because it complies with the City’s GHG Reduction Strategy. See IS, p. 83. The GHG Reduction Strategy is based on the Bay Area Air Quality Management District (“*BAAQMD*”) standards, including its “Clean Air Plan,” and intended to suffice as programmatic mitigation measures for future projects. However, the adequacy of the Strategy is predicated on Downtown development limited to Phase 1 Capacity, which has or will soon be reached. Because the City dispenses with any project-specific GHG analysis, it is uncertain whether compliance with the GHG Reduction Strategy will adequately mitigate the Project’s GHG impacts.

This information indicates that the Project may cause new significant environmental effects or increase the severity of impacts identified in the past program EIRs. Like the GHG Reduction Strategy, the Strategy 2000 and Envision 2040 have or will soon reach the end of their utility as responsible planning documents. As such, compliance with these documents does not ensure that the Project will have less than significant impacts or no new impacts previously disclosed, including the laundry list of potential impacts dispensed within the IS. As such, SEIR recirculation is required.

3. Improper Project Description, Objectives, and Other Inconsistencies

“An accurate, stable and finite project description is the sine qua non of an informative and legally adequate EIR.” *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192. “[A] curtailed or distorted project description,” on the other hand, “may stultify the objectives of the reporting process.” *Id.*

First, the Project’s underlying land use designation “does not explicitly permit residential development.” SEIR, p. 25; see also SJMC § 20.40.100, Table 20-90. However, the SEIR fails to mention any zone change, variance, conditional use permit, or any other kind of approval required under the City Code. Second, the Project objectives are too narrowly defined. For example, expansion of the Tech Museum is identified as the specific Project objective, rather than the more flexible objective of securing adequate community benefits. This artificially limits the range of Project alternatives to include only projects that expand the Museum, while forgoing any discussion of environmentally superior projects that provide a more equitable mix of public benefits achievable through a negotiated DDA (e.g. quality jobs, affordable housing units, parks and spaces open to the public, etc.). Third, the SEIR vaguely refers to a shared valet service for the Project’s combined uses without any elaboration on daily operations of the Project as a whole, such as the extent hotel staff will service the patrons of the retail establishments, visitors to the Tech Museum, and the residents and guests of the Project’s 306 dwelling units. No discussion is given whether the

expanded portions of the Tech Museum will be open to the public or require a fee. Nor is it discussed whether hotel staff will be required to service the 240,817 SF of combined common areas space for the Project's residential, hotel, and office components. Finally, equally lacking is a consistent and accurate accounting of development totals. Despite the Project including 19,002 SF of total retail development, including 13,402 SF of ground-level and 5,600 SF of museum-related retail (see SEIR, pp. 14 and 49), the SEIR discusses only 14,012 SF in the General Plan consistency section (*id.* at 24) and the SEIR traffic operation analysis references only 14,116 SF of retail space.⁸ In the "Project Alternative" section, the SEIR discusses 302,310 SF of residential space, when in fact residents will apparently utilize a total of 431,235 SF of space, including dwelling units, terraces, and common areas. See SEIR, pp. 14 and 49.

These omissions, errors, and inconsistencies distort the Project description. The SEIR must be circulated to fix these errors and provide the public with an accurate, stable and finite Project.

4. *Improper Piecemealing Of the Project DDA*

As noted above, this Project will be subject to a DDA negotiated with the City (see SEIR, p. 16; IS, p. 5.), which will be an integral component of this Project. To date, however, neither the City nor the Developer have disclosed to the Commentor or the Public with the terms of the DDA or even a general sense of the community benefits being considered. In separating and segmenting the DDA discussion from the land use entitlements for the Project, the City's conduct constitutes improper piecemealing and violates CEQA's informational and disclosure mandates. CEQA mandates "that environmental considerations do not become submerged by chopping a large project into many little ones - each with a minimal potential impact on the environment - which cumulatively may have disastrous consequences." *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-84 (1975); *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452. Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project and a public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences.

CEQA is constructed around an inclusive definition of "project" for the purpose of preventing public agencies from pre-committing to an approval and from segmenting projects in a way that diminishes apparent environmental impacts. The DDA should be disclosed and analyzed now, in connection with the SEIR.

⁸ Hexagon Transportation Consultants (Feb. 2017) Museum Place Mixed-Use Development Traffic Operations Analysis, p. 1 (Introduction), available at <http://www.sanjoseca.gov/DocumentCenter/View/66142>.

5. *The SEIR Does Not Consider a Reasonable Range of Alternatives*

The discussion of mitigation and alternatives is “the core of an EIR,” requiring a lead agency to select a reasonable range of alternatives for evaluation. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564, 566; CEQA Guidelines § 15126.6(a). While alternatives must implement the most basic project objectives, they need not implement all of them. See *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477; see also *California Native Plant Soc’y v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 991. A project sponsor may not artificially limit its ability to implement a reasonable alternative to the project by prior contractual commitments, like a DDA. See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736.

Here, as discussed above, the Project narrowly defines the Project objective to Tech Museum expansion. First, this narrow definition artificially limits the Project to only this specific site and therefore improperly eliminates off-site alternatives. See SEIR, p. 48. Second, beyond the mandatory no project alternative, the SEIR considers only a single design alternative (that reduces the Project height) at the sole expense of residential development and sacrificing not a single SF of office, retail, or Museum expansion. Pursuant to CEQA Guidelines § 15126.6(c), a design alternative that reduces office space and includes greater residential units – especially affordable units – would reduce significant shade impacts; secure a more diverse array of community benefits while meeting core Project objectives, and be feasible as an alternative that is more consistent with applicable zoning and affordable housing laws. Therefore, the SEIR’s failure to analyze other design alternatives with an equitable balance of uses is artificially limiting and without merit. See SEIR, p. 50.

The City must recirculate the SEIR to include a reasonable range of alternatives that includes a Project that includes affordable units and does not reduce building height at the sole expense to residential component of the Project.

6. *Deferred Mitigation on Historic Resources and Tree Impacts*

CEQA disallows deferring the formulation of mitigation measures to post-approval studies. *CBE v. Richmond*, 184 Cal. App. 4th at 92, CEQA Guidelines § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309. An agency may only defer the formulation of mitigation measures when it possesses “‘meaningful information’ reasonably justifying an expectation of compliance.” *Sundstrom* at 308; see also *Sacramento Old City Ass’n v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-29 (mitigation measures may be deferred only “for kinds of impacts for which mitigation is known to be feasible”). A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement

water was available). This approach helps “insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug.” *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Ass’n* (1986) 42 Cal.3d 929, 935.

a. Historic Resources Analysis Is Faulty

Under Pub. Res. Code § 15064.5(b), a project would have a significant effect on a historic resource if it would “cause a substantial adverse change in the significance” of that resource. Specifically, “substantial adverse change in the significance of an historical resource means physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings such that the significance of an historical resource would be materially impaired.”

Here, the Project is located adjacent to the historic Civic Auditorium and McCabe Hall. As indicated in the rendering included in the SEIR images, the 24-story tower will dwarf these resources (see Figure 2.3-2 and 2.3-4, SEIR, pp. 10, 12) and cause new shadow impacts on these structures in the late afternoons during the spring and summer months (compare Figure 3.1-1 with Figure 3.1-2, SEIR, pp. 27-28). These shadow impacts can materially impair the significance of these resources and are not discussed in the SEIR or Historic Evaluation contained in Appendix C (“*Evaluation*”). Additionally, the Evaluation prematurely concludes that compliance with the City’s General Plan and Historic Design Guidelines (“*Design Guidelines*”) would adequately mitigate potential impacts to these adjacent properties. *Id.* at 6. First, the study fails to consider two of the eight contextual elements intended to be considered when involving new development next to historical properties. *Id.* at 32. Second, the Project’s full mass abuts the auditorium (see Figure 2.3-5, SEIR, p. 13), which refutes the Evaluation’s claim to the contrary, and directly conflicts with Design Guidelines regarding massing. See Evaluation, p. 35. Third, the Evaluation acknowledges that demolition of Parkside Hall “will remove any remaining link to understanding [Mayor Janet Gray Hayes]’s importance to the evolution of Downtown San Jose ... [and] recommended that additional actions be taken ... to convey this important contribution.” *Id.* at 8. However, “no physical action has been undertaken at present to mitigate this fading legacy” (*id.* at 40), nor is any specific action proposed in the Evaluation, the SEIR, or the Applicant in the Project as proposed.

b. Loss of Protected Trees Is Inadequately Identified and Mitigated

The Project intends to replace all 53 trees located on and adjacent to the site, including the 22 protected trees under the City’s Tree Ordinance. See SJMC §§ 13.31.010 to 13.32.100. Although the City’s General Plan Policy ER-5.1 and 5.2 seek to avoid activities that could impact native bird nests, neither the SEIR nor the IS discusses whether the 53 trees contain any native birds nest which could be impacted by the removal of all 53 trees. Additionally, the SEIR/IS fails to describe any efforts made to maintain and preserve the protected trees, contrary to Policy MS-21.4 and 21.5 that encourages preservation.

Similarly, no discussion is given to the current canopy and shade afforded by the existing trees. Therefore, it cannot be assured that tree replacement will be truly one-for-one value, including similar year-round aesthetic value or comparable shade relief during extreme heat events expected to become more common for Californians in urban areas like San Jose.⁹

Without more information, the removal of these 53 trees may cause a significant environmental impact. It will have undoubted short to medium term aesthetic impacts, for a generation or more of City residents. Also, protection of biological resources is a fundamental policy incorporated in CEQA. Loss of urban tree cover is often considered to be a significant adverse biological impact, including habitat for resident bird species and for migratory species both during migration and as wintering habitat, which is never discussed in the SEIR or IS. It is also questionable whether the one-to-one tree replacement complies with City policy.

The SEIR must be recirculated to account for this deferred mitigation.

7. *Incomplete Overriding Considerations*

In addition to the abovementioned undisclosed land use, GHG, historic resource and biological impacts, the SEIR admits the Project will have significant, unmitigated land use impacts in the form of shadows cast on the Plaza de Cesar Chavez park. As a result, a statement of overriding considerations will be required. Under CEQA, when an agency approves a project with significant environmental impacts that will not be fully mitigated, it must adopt a "statement of overriding considerations" finding that, because of the project's overriding benefits, it is approving the project despite its environmental harm. See CEQA Guidelines § 15043; Pub. Res. Code § 21081(B); *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222. A statement of overriding considerations expresses the "larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes and the like." *Concerned Citizens of South Central LA v. Los Angeles Unif. Sch. Dist.* (1994) 24 Cal.App.4th 826, 847.

A statement of overriding considerations must be supported by substantial evidence in the record. See CEQA Guidelines § 15093(b); see also *Sierra Club v. Contra Costa Co.* (1992) 10 Cal.App.4th 1212, 1223). As with all findings, the agency must present an explanation to supply the logical steps between the ultimate finding and the facts in the record. *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

⁹ See Cal. EPA & Cal. Department of Public Health (Oct. 2013) Preparing California For Extreme Heat: Guidance and Recommendations, pp. 22-26, available at http://www.climatechange.ca.gov/climate_action_team/reports/Preparing_California_for_Extreme_Heat.pdf.

To the extent that overriding considerations are needed, key among the findings that the lead agency City must make is that:

“Specific economic, legal, social, technological, or other considerations, including the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report. [and that those] benefits of the project outweigh the significant effects on the environment.” Pub. Res. Code § 21081(a)(3) and (b) (emphasis added).

Here, the SEIR makes an insufficient effort to determine whether new jobs created by the Project, in either the construction phase or the operational phase, will be for “highly trained workers,” and what the likely salary and wage ranges of these jobs will be. Information is completely lacking regarding the DDA, whether any affordable units will be provided, or whether the public will have access to the expanded portions of the Tech Museum. Without this information, the City lacks substantial evidence to make any statement of overriding considerations.

The City should include defined requirements around job quality. Such a requirement will ensure that the Project provides “employment opportunities for highly trained workers” in accordance with the mandates of CEQA. Without such requirements, the Project may fail to provide high-quality job opportunities. The City cannot find that the economic benefits of the Museum Project outweigh the environmental costs if it does not know what the economic benefits will be.

8. Required Land Use Findings

The CEQA, land use and other concerns addressed in this letter must be adequately addressed in order to make the required City of San Jose Zoning Code findings. The entitlements are discretionary, not by right.

Absent compliance with the issues addressed herein, Insight’s requested discretionary entitlements should be rejected by the City and the required discretionary findings not made. See, eg, SJMC § 10.10.630 (site development permit shall be granted only if “consistent with and will further the policies of the general plan and applicable specific plans and area development policies ... [;] conforms with the zoning code and all other provisions of the San José Municipal Code applicable to the project ... [;] consistent with applicable city council policies, or counterbalancing considerations justify the inconsistency); SJMC § 18.02.230 (the city council shall not approve a development agreement unless “proposed development is consistent with the general plan and all applicable specific or area plans; ... meet important economic, social, environmental or planning goals of the city;” or is a development going “beyond that required by existing city zoning code ... [and] located on a legal parcel of at least five acres; ... [e]ven if all of the findings set forth ... can be made, the city council, in its sole discretion, may deny the development agreement on the grounds that in its opinion the proposed agreement is not

in the best interest of the public.”); SJMC § 13. 32.100 (a tree removal permit shall not be granted if doing so would significantly frustrate the purpose of the law, such as reducing urban temperatures, or where applicants of an improvement fails to show that the location of the tree unreasonably restricts the development; and SJMC § 20.100.630 (A)(6) (site development permit shall not be granted if “the environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative affect on adjacent property or properties.”)

As discussed above, these findings cannot be made for the Project as proposed.

9. SEIR Recirculation is Required

CEQA requires a lead agency to recirculate an EIR when significant new information is added to the EIR following public review but before certification. See Pub. Res. Code § 21092.1. The CEQA Guidelines clarify that new information is significant if “the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project” including, for example, “a disclosure showing that ... [a] new significant environmental impact would result from the project.” CEQA Guidelines § 15088.5.

This recirculation principle applies here with regard to the abovementioned unstudied and mitigated Project impacts, SEIR omissions, and Project land use inconsistencies.

V. Conclusion

Local 19 appreciates the opportunity to provide these comments concerning the Project. For the abovementioned reasons, Commentor urges the City to ensure compliance with CEQA. Commentor herein raises specific concerns about the Project SEIR with respect to land use inconsistency, reliance on outdated Program EIRs, improper Project description and piecemealing, failure to analyze a reasonable range of alternatives, deferred mitigation of historic resources and loss of protected trees, faulty overriding considerations and the need for SEIR recirculation.

Rising inequality threatens San Jose’s prosperity. There is a serious affordable housing shortage in the region. Local 19 works to stem this rising tide of inequality, and to make our region a place of opportunity for all – a place where its members can work and afford to live. Yet, the Project as proposed may do nothing to remedy this affordable housing need. The City must ensure community benefits include more equitable components, like an affordable housing component. Local 19 is extremely concerned about this lack of affordable housing, and whether the Project satisfies the City’s General Plan

Goals and Policies and City Code. The City has the power and authority to disapprove the Project or to ensure that it actually benefits our City. **Please use it.**

Commentor respectfully reserves the right to supplement these comments at hearings and proceedings for this Project. See *Cmtys. for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 86 (EIR invalidated based on comments submitted after Final EIR completed); *Galante Vineyards*, 60 Cal.App.4th 1109, 1120 (CEQA litigation not limited only to claims made during EIR comment period).

Finally, this Office is requesting, on behalf of Local 19, all notices of CEQA actions and any approvals, Project CEQA determinations, or public hearings to be held on the Project under any provision of Title 7 of the California Government Code, as well as the City Municipal Code. This request is filed pursuant to Pub. Res. Code §§ 21092.2 and 21167(f), and Government Code § 65092, that require local agencies to mail such notices to any person who has filed a written request for them. Please send notice by electronic and regular mail to: Gideon Kracov, Esq., 801 S. Grand Avenue, 11th Fl., Los Angeles, CA 90017, gk@gideonlaw.net.

Thank you for consideration of these comments. We ask that they are placed in the Administrative Record for the Project.

Sincerely,



Gideon Kracov
Attorney for UNITE HERE Local 19